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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

CROATAN BOOKS, INC.,
Petitioner

v.

COMMONWEALTH OF VIRGINIA
Respondent

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF FAIRFAX COUNTY, VIRGINIA

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States.

The Commonwealth of Virginia, the Respondent, prays that the Petition for Writ of Certiorari be denied.

TABLE OF CONTENTS

	Page
TABLE OF CASES	ii
STATEMENT OF THE CASE	1
ARGUMENT	3
The manner of presenting the films did not prevent a proper evaluation of their content.	

TABLE OF CASES

	Page
Bourland v. State, 502 S.W.2d 8 (Tex. Crim. App. 1973)	3
Bryers v. State, 408 S.W.2d 712 (Tex. Crim. Appl. 1973)	3
Croatan Books Inc. v. Commonwealth of Virginia, cert. denied, June 22, 1981 (No. 80-1601)	5
McKinney v. Tuscaloosa, 268 So.2d 488 (Ala. 1972)	3
Miller v. California, 413 U.S. 15 (1973)	4
Roth v. United States, 354 U.S. 476 (1957)	4
Zenith International Film Corp. v. City of Chicago, 291 F.2d 785 (7th Cir. 1961)	3

STATEMENT OF THE CASE

Respondent is in substantial agreement with Petitioner's Statement of the Case. However, the record of trial (dated June 16, 1980) reflects other matters bearing on the question presented.

Prior to viewing the film in question, the trial court gave the following instruction to the jury:

> It is important that you consider each film in its entirety. You must consider each film as a whole. In the event that at any time you are unable to do this, then I ask that you simply bring it to the Court's attention. If at any time the procedure is difficult to follow, just simply raise your hand and let the court know that, but it's important that you consider each film on its own merits and that you consider each film as a whole. (Page 6).

A similar instruction was given at the close of the evidence. (Pages 205-6).

Each film was shown in its entirety and was introduced into evidence. Adjustments in the location of projectors were

made during the presentation at Petitioner's request. (Page 8).

The transcript reflects that certain persons viewed the films along with the jury, and subsequently testified regarding community standards. Ms. Lenor Binzer and Mr. DeForrest Z. Rathbone, Jr., testified for the Commonwealth, and upon cross-examination were questionned about the contents of the films. Specific reference was made by Petitioner's Counsel to the film, "Sexy Plant Doctor". See pages 17-20 and 46-48. Similarly, Dr. Lawrence Donner testified in behalf of Petitioner after viewing the films along with the jury and was examined on their content. See pages 73-76.

ARGUMENT

THE MANNER OF PRESENTING THE FILMS DID NOT PREVENT A PROPER EVALUATION OF THEIR CONTENT.

It is of primary importance to accurately characterize the nature of the viewing procedure complained of here, so as to distinguish this case on its facts from those cited by Petitioner. While two or three films were shown simultaneously, the record of trial reflects that each film was shown to the jury in its entirety and that each film was introduced into evidence. Respondent did not rely on isolated film segments, as in, e.g., Zenith International Film Corp. v. City of Chicago, 291 F.2d 785 (7th Cir. 1961), and McKinney v. Tuscaloosa, 268 So.2d 488 (Ala. 1972), or on still photographs, as in, e.g., Bourland v. State, 502 S.W.2d 8 (Tex. Crim. App. 1973) and Bryers v.

State, 480 S.W.2d 712 (Tex. Crim. App. (1973). Consequently, there is no violation of the viewing standards set forth in Miller v. California, 413 U.S. 15 (1973) and Roth v. United States, 354 U.S. 476 (1957).

Petitioner would nonetheless have this Court impose an entirely new and different standard of review based on nothing more than the imagined physical limitations of the jurors who witnessed the films. No such limitations are evident from the record of trial and may not be presumed. The manner in which the films were shown allowed each juror to view each film in its entirety, and adjustments were made to Petitioner's apparent satisfaction. Prior to viewing, the trial judge instructed the jury as to the importance of viewing each film in its entirety, and provided guidance as to how

the court could be notified in the event that procedure became difficult to follow. No such notice was ever given by any juror.

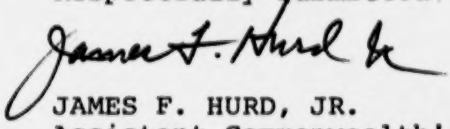
The record of trial further reflects that two Commonwealth witnesses, on cross-examination, and one witness for Petitioner were able to answer specific questions regarding what they had seen, after viewing the films along with the jury. There is no basis on which to conclude that the jurors were any less observant.

The question presented for review was previously raised in this Court in Croatan Books, Inc. v. Commonwealth of Virginia, cert. denied, June 22, 1981 (No. 80-1601). The method of presentation of the evidence in that case was identical to that in the instant case.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Petition for Writ of Certiorari be denied.

Respectfully submitted.



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